

October 15, 2013

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Signed and Filed: October 11, 2013



Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case
PHILIP L. MARIGMEN and) No. 08-32022DM
RUBYRUTH Q. MARIGMEN,) Chapter 7
Debtors.)
ROBERT LUNBECK and) Adversary Proceeding
KATHLEEN LUNBECK,) No. 13-3166DM
Plaintiffs,)
v.)
PHILIP L. MARIGMEN and)
RUBYRUTH Q. MARIGMEN,)
Defendants.)

MEMORANDUM DECISION ON COMPLAINT TO
DETERMINE DISCHARGEABILITY OF DEBT

I. INTRODUCTION

This is a sad case of a home repair project that did not go well for the plaintiffs and was not well handled by the defendant. Eleven years later, the court is asked to determine whether a 2002 small claims court judgment in the principal sum of \$2,745 (now with accrued interest and costs originally awarded by the court amounting to over \$5,600) is nondischargeable in defendant's

1 bankruptcy.

2 Recognizing that the plaintiffs bear the burden of proof by a
3 preponderance of the evidence, and that there is a presumption of
4 a fresh start in favor of debtors, the court concludes, for the
5 reasons that follow, that defendant's liability on that 2002
6 judgment is discharged.

7 II. DISCUSSION¹

8 In 1999, plaintiffs Robert Lunbeck and Kathleen Lunbeck hired
9 defendant Philip L. Marigmen ("Marigmen"), a handyman, to do some
10 home repairs at their condominium on Vallejo Street in San
11 Francisco. That job was preformed satisfactorily.

12 Three years later, when the Lunbecks were preparing to ready
13 their condominium for sale, Mr. Lunbeck contacted Marigmen about
14 doing some more work for him, including fixing electrical
15 problems, minor carpentry, painting, plumbing and similar work,
16 all set forth in Trial Exhibit 4-1.

17 At the same time, the Lunbecks were moving into a new home on
18 Junipero Serra Boulevard in San Francisco, and Mr. Lunbeck
19 outlined some other tasks that they wanted Marigmen to handle.

20 Marigmen made a preliminary estimate of the costs to do the
21 work at Vallejo Street but needed to see Junipero Serra Boulevard
22 before giving Mr. Lunbeck an estimate. The parties traded e-mails
23 about how much time the project would take and the need for
24 Marigmen to get underway promptly.

25 Marigmen met Mrs. Lunbeck on August 22, 2002, to discuss his
26 work. Trial Exhibit 6 shows a series of handwritten invoices

27 ¹ The following discussion constitutes the court's findings
28 of fact and conclusions of law. Fed. R. Bankr. P. 7052(a).

1 given to Mrs. Lunbeck by Marigmen and checks and one cash payment
2 given to Marigmen by Mrs. Lunbeck over the next several days, as
3 follows:

4 August 22 - \$450 - Deposit for material and labor

5 August 24 - \$280 - Deposit for material

6 August 24 - \$150 - Deposit for labor

7 August 25 - \$300 - Deposit for work at Junipero Serra

8 August 27 - \$150 - Purpose unknown

9 August 30 - \$300 - Deposit for labor and materials at
10 Junipero Serra

11 August 31 - \$350 - Deposit for labor and materials at
12 Junipero Serra

13 Date Unknown- \$200 - Deposit for materials (cash)

14 September 5 - \$400 - Deposit for material and earthquake and
15 child proofing

16 TOTAL PAID - \$2,580

17 Shortly after August 22, Marigmen began some of the work but
18 most of the specific materials for which deposits were made were
19 never produced. By September 5, when Marigmen was asking for more
20 money, the Lunbecks terminated his services.

21 They sued him in small claims court on November 6, 2002.
22 Judgment was entered against Marigmen on December 30, 2002, in the
23 sum of \$2,745 plus \$62 in costs (the "Judgment").²

24 The Marigmens filed Chapter 7 bankruptcy in this court on

25 ² Marigmen's wife, Rubyruth Q. Marigmen, was not named as a
26 judgment defendant and she had no dealings with the Lunbecks. She
27 is entitled to judgment in her favor in this adversary proceeding
28 without any further discussion.

1 October 24, 2008 and they received a discharge on February 2,
2 2009. At no time during that bankruptcy did either of the
3 Lunbecks have knowledge of the bankruptcy case.

4 On May 24, 2013, the court received a letter from Mr. Lunbeck
5 describing a motion Marigmen had filed with the San Francisco
6 Small Claims Court to vacate the Judgment because he had received
7 a discharge in 2009. Mr. Lunbeck explained in his letter that the
8 underlying debt had been incurred through fraudulent activity and
9 he had not been listed as a creditor in Marigmen's bankruptcy
10 case. The court treated that letter as the equivalent of a
11 complaint initiating this adversary proceeding (Docket No. 1).

12 Marigmen responded by letter received by the court on July 3,
13 2013. He argued first that the complaint was not filed within the
14 ninety day time period provided in his bankruptcy in 2008.
15 Following that was a lengthy denial of Mr. Lunbeck's allegations
16 of fraud. The court treated Marigmen's letter as the equivalent
17 of an answer to the informal complaint in this adversary
18 proceeding (Docket No. 9).

19 Bankruptcy Code § 523(a)(3)³ renders nondischargeable a debt
20 to a creditor who is neither listed nor scheduled in time to
21 permit filing an adversary proceeding if the debt is based upon
22 §§ 523(a)(2), (4) or (6) or in any event if there is no time to
23 file a proof of claim.

24 As noted in Beaty v. Selinger (In re Beaty), 306 F.3d 914,
25 921-22 (9th Cir. 2002):

26
27 ³ Unless otherwise indicated, all section references are to
28 the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 Section 523(a)(3)(B) provides for the exception from
2 discharge of certain debts—most notably, for purposes of this
3 case, debts involving fraud on the part of the debtor—when
4 those debts were not listed by the debtor in the schedule of
5 creditors. The Bankruptcy Code and Rules treat these debts
6 differently from debts of the same sort that have been
7 properly scheduled. Specifically, § 523(a)(3)(B) creates a
8 nondischargeability action for defrauded creditors who were
9 neither listed nor scheduled and had no notice or actual
10 knowledge of the case in time to permit the timely filing of
11 a proof of claim or a timely request for a determination of
12 dischargeability.

13 Under In re Beezley, 994 F.2d 1433 (9th Cir. 1993), in a no
14 asset Chapter 7 case (such as Marigmen's) the debts are discharged
15 regardless of the time the creditor learns of the bankruptcy,
16 except to the extent that they fall within the provisions of
17 § 523(a)(3)(A). Because the Lunbecks allege that Marigmen's debt
18 was based upon fraud or embezzlement, and Marigmen's liability,
19 has been fixed by the Judgment, the only issue to be tried in this
20 court is whether §§ 523(a)(2) or (4) render it nondischargeable.
21 The elements of Section 523(a)(2) are well established:

22 Section 523(a)(2)(A) of the Bankruptcy Code prohibits the
23 discharge of any enforceable obligation for money, property,
24 services, or credit, to the extent that the money, property,
25 services, or credit were obtained by fraud, false pretenses,
26 or false representations. 11 U.S.C. § 523(a)(2)(A); Cohen,
27 523 U.S. at 218, 118 S.Ct. 1212. The creditor bears the
28 burden of proving the applicability of § 523(a)(2)(A) by a
preponderance of the evidence. Slyman, 234 F.3d at 1085. We
have consistently held that making out a claim of non-
dischargeability under § 523(a)(2)(A) requires the creditor
to demonstrate five elements:

- 23 (1) the debtor made ... representations;
- 24 (2) that at the time he knew they were false;
- 25 (3) that he made them with the intention and purpose of
26 deceiving the creditor;
- 27 (4) that the creditor relied on such representations;
[and]
- 28 (5) that the creditor sustained the alleged loss and

1 damage as the proximate result of the misrepresentations
2 having been made.

3 Ghomeshi v. Sabban (In re Sabban), 600 F.3d 1219, 1222 (9th Cir.
4 2010); Am. Express Travel Related Servs. Co. v. Hashemi (In re
5 Hashemi), 104 F.3d 1122, 1125 (9th Cir.1996) (quoting Britton v.
6 Price (In re Britton), 950 F.2d 602, 604 (9th Cir.1991)).

7 Those elements of fraud under section 523(a)(2)(A) "'mirror
8 the elements of common law fraud' and match those for actual fraud
9 under California law, which requires that the plaintiff show: (1)
10 misrepresentation; (2) knowledge of the falsity of the
11 representation; (3) intent to induce reliance; (4) justifiable
12 reliance; and (5) damages." Tobin v. Sans Souci Ltd. P'ship (In
13 re Tobin), 258 B.R. 199, 203 (9th Cir. BAP 2001) (emphasis added),
14 quoting Younie v. Gonya (In re Younie), 211 B.R. 367, 373-74 (9th
15 Cir. BAP 1997), *aff'd*, 163 F.3d 609 (9th Cir.1998) (table
16 decision).

17 At trial the court heard from Mr. and Mrs. Lunbeck; Marigmen
18 did not testify. From the evidence presented the court finds that
19 Marigmen did not knowingly deceive either of the Lunbecks and thus
20 his debt evidenced by the small claims court judgment should be
21 discharged.

22 While it is true that the Lunbecks paid for some materials
23 that Marigmen did not ever deliver, and after he was terminated,
24 Marigmen told Mr. Lunbeck that he had not purchased the requested
25 materials, the evidence will not support the finding that at the
26 time of the referenced payments Marigmen did not intend to perform
27 either his promised labor or the acquisition of necessary
28 materials. In fact, he did commence work, albeit work that for

1 the most part was unsatisfactory to the Lunbecks. While the
2 provision of labor and the purchase of materials are two separate
3 functions, they are inextricably bound together in this simple
4 contractual relationship for modest home repairs. The Lunbecks
5 have not proven that the promises to purchase the merchandise were
6 knowingly false when made; to the extent that they contend that
7 Marigmen did not intend to perform the work, that is belied by the
8 fact that he indeed did perform some work, even some of which was
9 somewhat satisfactory despite most of it being unsatisfactory. In
10 short, performing work poorly is not the same as fraudulently
11 inducing payment for it.

12 Even assuming Mrs. Lunbeck, who had all the face-to-face
13 dealings with Marigmen, was not knowledgeable in the type of home
14 repair that she requested, if Marigmen had not performed some of
15 the work during the period after August 22, she should not have
16 paid him any more money. The fact that she did pay him convinces
17 the court that the work was underway at the two different
18 locations and the fact that all of the requested materials had not
19 been produced on site does not mean that Marigmen did not intend
20 to perform or intend to purchase the materials, or that he
21 intentionally deceived Mrs. Lunbeck, when he asked for and
22 received the advances between August 22 and September 5.

23 The Lunbecks plea for a charge of embezzlement under
24 § 524(a)(4) is simply unsupportable since none of the conduct of
25 Marigmen amounts to embezzlement. Federal law and not state law
26 controls the definition of embezzlement for purposes of section
27 523(a)(4). First Del. Life Ins. Co. v. Wada (In re Wada), 210
28 B.R. 572, 576 (9th Cir. BAP 1997). Embezzlement is defined as

1 "the fraudulent appropriation of property by a person to whom such
2 property has been entrusted or into whose hands it has lawfully
3 come." Id., quoting Moore v. United States, 160 U.S. 268, 269
4 (1895)). In the context of an exception to discharge claim,
5 embezzlement requires (1) property rightfully in the possession of
6 a nonowner, (2) a nonowner's appropriation of the property to a
7 use other than which it was entrusted, and (3) circumstances
8 indicating fraud. Transam. Commercial Finance Corp. v. Littleton
9 (In re Littleton), 942 F.2d 551, 555 (9th Cir.1991).

10 Marigmen was not entrusted with any funds that he then
11 converted or misappropriated; in all instances Mrs. Lunbeck
12 voluntarily gave him the funds he received and their case stands
13 or falls solely under § 523(a)(2) as discussed above.

14 III. CONCLUSION

15 From the foregoing the court finds as a matter of fact that
16 although certain representations were made by Marigmen, Mrs.
17 Lunbeck relied on them, and the Lunbecks were damaged (as
18 reflected in the Judgment), the critical element of knowing
19 deception is lacking under § 523(a)(2).

20 From that essential fact, the court concludes that the
21 Judgment should be discharged.

22 The court is concurrently entering a judgment of
23 dischargeability of the Judgment.

24 **END OF MEMORANDUM DECISION**

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